**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| **In the Matter of** | **)** | |
| | **)** | |
| **Accelerating Wireline Broadband** | **)** | **WC Docket No. 17-84** |
| **Deployment by Removing Barriers** | **)** | |
| **To Infrastructure Investment** | **)** | |

**To: The Commission**

# COMMENTS OF THE COALITION OF CONCERNED UTILITIES

**Arizona Public Service Company**
**Evergy**
**Eversource Energy**
**Exelon Corporation**
**FirstEnergy**
**Hawaiian Electric Companies**
**Minnesota Power**
**NorthWestern Energy**
**Puget Sound Energy**

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**Filed: October 29, 2019**

# SUMMARY OF ARGUMENT

CTIA's Petition should be rejected, as it contains proposals that would be prohibitively burdensome, sacrifice vital utility standards that have been developed over decades, and reject commonsense compromises necessary for pole attachment contract negotiations. The *Coalition* respectfully suggests that the best public policy is one that encourages all affected parties to resolve their attachment issues collaboratively based on local operating and regulatory conditions, to ensure that pole owners have incentives to continue to replace poles, and to ensure that utility operating and design standards be respected and followed.

CTIA's proposals are also unnecessary, untimely and counterproductive. Utilities are willing to work with wireless carriers because they recognize the necessity in the deployment of advanced communications for the benefit of their own communities; however, utilities cannot continue to assist at *any* cost, and cannot participate at the expense of what they consider to be the safe, reliable and efficient operation of utility distribution and streetlighting systems.

CTIA's proposal that the Commission begin regulating attachments to streetlight-only poles would violate the Pole Attachment Act, which does not require utilities to provide access to any utility property that is not part of a distribution network. Streetlight-only poles are not part of the distribution network.

Accommodating wireless attachment installations on streetlight-only poles is expensive, complicated, and time consuming, and requires the dedication of considerable utility resources, which can occur only in an unregulated environment. Many utilities, including many *Coalition* members, are willing to make that commitment because the current unregulated environment allows the parties to work through the numerous delays and operating challenges, allows utilities

to staff up when possible to address these challenges, and creates incentives for utility pole owners to undertake the extraordinary effort and expense required to accommodate such installations.

Such incentives would disappear with Commission regulation. All proposed attachments to streetlight-only poles require the existing pole to be replaced with a new pole that is custom designed and engineered to accommodate the additional equipment and weight. Utilities would be unwilling to expand such capacity if they must undertake the extraordinary challenges associated with accommodating wireless attachments while being subjected to make-ready deadlines and regulated rates. As Chairman Pai explained: "It's basic economics: The more heavily you regulate something, the less of it you're likely to get."

Regulation would not only be counterproductive, it would also be difficult. There is little chance any FCC make-ready deadlines could be met, since streetlight-only poles need to be replaced with specially designed poles, they often require specially-designed material that is not in stock, new upgraded electricity (and communications fiber) must be routed to these former streetlight-only facilities, sidewalks, streets and parking lots must be torn up, removed and replaced, and other operational constraints are created by wireless attachments on streetlight-only poles. Should anyone seek to string overhead fiber from streetlight-only pole to streetlight-only pole, they would encounter numerous additional jurisdictional codes, engineering, operational and aesthetic issues associated with loading, clearances, guying, pole locations, proper streetlighting, and citizen oppositions, all of which are compounded by the limitless variety of streetlight-only poles and locations.

A rulemaking would be required to understand the operational issues, but also annual rental rates, since the costs associated with streetlight-only poles are not identified in Account

364 but rather in Account 373, which is not currently part of the Commission's formula. Altogether, it might take a decade of work for the Commission to develop adequate rates and other regulations to cover attachments to streetlight-only poles.

Utility standards regarding attachments to the "unusable" space should be respected, and if CTIA is seeking access to the "unusable" space on poles despite utility standards to the contrary, its request should be denied. The Commission instead should affirm that each utility's standards, which were designed to ensure the safe and efficient operation of its electric distribution system, must control the types of equipment (if any) permitted to occupy this "unusable" space.

Utility engineering, operating and design standards have been developed over the course of decades as experience and engineering require. The question of which equipment should be allowed on poles, like other questions regarding the safe and efficient operation of the electric distribution system, requires analysis of a complex web of interrelated safety and reliability factors, based on a hundred years of solving such challenges. Moreover, such standards have guided the construction of billions of dollars in utility plant investment and been subjected to countless regulatory reviews for prudency and usefulness by state public utility commissions. They cannot and should not be cavalierly dismissed.

Utilities generally prohibit attachments in the "unusable" space because of fall hazards, climbing obstructions, and efficiency of pole replacements. All of these are associated with a safety, reliability or generally applicable engineering goal, and as such the Pole Attachment Act allows utilities to impose such prohibitions.

By asking the Commission to ignore utility standards, CTIA's proposal is essentially asking utility professional engineers to violate their code of ethics. And although CTIA's

Petition claims attachments in the "unusable" space are "crucial," they actually are not, considering that alternatives exist.

The Commission should not mandate that pole attachment contracts never differ from FCC regulations. CTIA's Petition seeks a "clarification" that utilities cannot seek terms that conflict with the pole attachment rules, but the Commission already has "clarified" the opposite; that parties may enter into agreements that differ from FCC rules. CTIA's proposal is largely a solution in need of a problem, and the Commission's clarification on this topic makes both good business sense and good regulatory sense.

FCC regulations and precedent are capable of different interpretations, and contract negotiations enable the parties to reach compromise solutions. Flexibility in contract negotiations is required for a variety of reasons, but one very important reason is because different utilities are located in different places, with different regulatory requirements, with different operating conditions, with different attaching entities, with different personnel, and with different attachment processes. There is no one size fits all.

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# COMMENTS OF THE COALITION OF CONCERNED UTILITIES

Arizona Public Service Company, Evergy, Eversource Energy, Exelon Corporation, FirstEnergy, the Hawaiian Electric Companies, Minnesota Power, NorthWestern Energy, and Puget Sound Energy (collectively, "the *Coalition of Concerned Utilities*" or "*Coalition*"), by their attorneys and pursuant to the Public Notice and Order Granting Extension of Time issued by the Federal Communications Commission ("FCC" or "Commission"),[1] respectfully submit these Comments in response to CTIA's Petition for Declaratory Ruling filed on September 6, 2019 ("CTIA Petition").[2]

[1] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (rel. Sept. 13, 2019); *In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Granting Extension of Time, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (rel. Sept. 30, 2019).

[2] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Petition for Declaratory Ruling, WT Docket No. 17-79, WC Docket No. 17-84 (Sept. 6, 2019) ("*CTIA Petition*").

## I. FOREWORD

The electric utility members of the *Coalition of Concerned Utilities*, like other utilities across the country, have worked hard since the *April 2011 Pole Attachment Order*[3] to adjust to new pole attachment make-ready deadlines and to accommodate wireless attachments on or near electric distribution poles, all in an effort to speed the process by which communications companies attach their facilities to electric distribution poles. As this process requires the attachment of facilities to electric distribution poles carrying potentially hazardous electric currents, the *Coalition* appreciates the Commission's recognition that ensuring the safe and reliable operation of these electric distribution systems is paramount.

Over the years, electric utilities have diverted valuable, scarce resources from their own electric operations focused on providing safe and reliable service to accommodate communications attachments, by (1) processing attachment applications, (2) performing engineering and design work for proposed attachments, (3) performing make-ready construction to "make" the poles "ready" for communications company attachers, (4) monitoring, auditing and inspecting authorized and illegal attachments following installation (including installations recklessly close to energized electric facilities), and (5) incurring legal and contractor expenses they would otherwise not have to incur. Utilities are not recovering these costs, including the ancillary costs associated with planning, forecasting, training, and managing these activities.

This diversion of utility resources and lack of cost recovery has had a negative impact on utility operations and maintenance. Yet ever since regulation of communications company attachments began, electric utility pole owners have voluntarily replaced poles to expand pole

[3] *In re Implementation of Section 224 of the Act: A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, WC Docket Nos. 07-25 *et al.*, 26 FCC Rcd 5240 (2011) ("*April 2011 Pole Attachment Order")*.

capacity with taller or stronger poles to accommodate new attachers, despite having no legal requirement to do so.[4]

CTIA's Petition contains proposals that would burden utilities even further, sacrifice utility standards that have been developed over decades, and reject commonsense compromises necessary for pole attachment contract negotiations. CTIA's proposals are prohibitively burdensome, but also unnecessary, untimely and counterproductive. Utilities are willing to work with wireless carriers because they recognize the necessity in the deployment of advanced communications for the benefit of their own communities; however, utilities cannot continue to assist at *any* cost.

The *Coalition* respectfully suggests that the best public policy is one that encourages all affected parties to resolve their attachment issues collaboratively based on local operating and regulatory conditions, to ensure that pole owners have incentives to continue to replace poles, and to ensure that utility operating and design standards be respected and followed.

## II. INTRODUCTION

### A. The *Coalition of Concerned Utilities*

The *Coalition of Concerned Utilities* is composed of a diverse group of electric utility companies in terms of size, attacher relationships and operational characteristics. The following is a brief description of the *Coalition* members.

**Arizona Public Service** - provides electric service to 1.2 million customers in 11 counties in Arizona. Arizona Public Service owns, in whole or in part, approximately 525,000 electric distribution poles and approximately 43,000 streetlight-only poles.

[4] *Southern Co. v. FCC*, 293 F.3d 1338, at 1346-48 (11th Cir. 2002).

**Evergy** – has two electric distribution operating companies; Kansas City Power & Light and Westar Energy, Inc., which collectively provide electric service to 1.6 million customers in Kansas and Missouri. Evergy owns approximately 1.8 million electric distribution poles and approximately 90,000 streetlight-only poles.

**Eversource Energy** - has three electric distribution operating companies and provides electric and natural gas service to approximately 3.6 million people in New Hampshire, Massachusetts, and Connecticut, and owns approximately 1.6 million electric distribution poles and approximately 25,000 streetlight-only poles.

- Connecticut Light & Power Company serves approximately 1.25 million customers in Connecticut, and owns approximately 674,000 electric distribution poles and approximately 9,500 streetlight-only poles.

- Public Service of New Hampshire serves approximately 517,000 customers in New Hampshire, and owns approximately 436,000 electric distribution poles and approximately 3,900 streetlight-only poles.

- NSTAR Electric & Gas Company serves 1.43 million customers in Massachusetts, and owns approximately 529,000 electric distribution poles and approximately 11,700 streetlight-only poles.

**Exelon Corporation**- has six electric distribution operating companies, provides electric and natural gas service to approximately 10 million customers and owns, in whole or in part, approximately 3,075,000 electric distribution poles.

- Atlantic City Electric serves approximately 547,000 customers in New Jersey and owns, in whole or in part, approximately 392,000 electric distribution poles.

- Baltimore Gas and Electric provides electric service to more than 1.25 million customers and natural gas to over 675,000 customers in Maryland. BGE owns, in whole or in part, approximately 360,000 electric distribution poles and approximately 65,500 streetlight-only poles on private property and 155,000 streetlight-only poles in public rights-of-way.

- ComEd provides electric service to more than 4 million customers in Illinois and owns, in whole or in part, approximately 1.4 million electric distribution poles, and approximately 150,000 streetlight-only poles.

- Delmarva Power provides electric service to over 500,000 customers in Delaware and Maryland and natural gas service to approximately 129,000 customers in northern Delaware. Delmarva Power owns, in whole or in part, approximately 297,000 electric distribution poles.

- PECO provides electric service to more than 1.6 million customers and natural gas service to over 500,000 customers in Pennsylvania. PECO owns, in whole or in part, approximately 415,000 electric distribution poles.

- Pepco provides electric service to more than 842,000 customers in the District of Columbia and Maryland and owns, in whole or in part, approximately 211,000 electric distribution poles.

**FirstEnergy**- has ten electric distribution operating companies and provides electric service to six million customers. FirstEnergy owns, in whole or in part, approximately 3.9 million electric distribution poles and over 42,500 streetlight-only poles.

- Jersey Central Power & Light serves approximately 1.13 million customers in New Jersey and owns, in whole or in part, approximately 348,895 electric distribution poles and 5,014 streetlight-only poles.

- Metropolitan Edison serves approximately 569,000 customers in Pennsylvania and owns, in whole or in part, approximately 343,785 electric distribution poles and approximately 1,288 streetlight-only poles.

- Penelec serves approximately 587,000 customers in Pennsylvania and owns, in whole or in part, approximately 498,932 electric distribution poles and approximately 1,375 streetlight-only poles.

- Penn Power serves approximately 166,000 customers in Pennsylvania and owns, in whole or in part, approximately 130,219 electric distribution poles and approximately 1,504 streetlight-only poles.

- West Penn Power serves approximately 726,000 customers in Pennsylvania and owns, in whole or in part, approximately 504,681 electric distribution poles and approximately 999 streetlight-only poles.

- Monongahela Power serves approximately 392,000 customers in West Virginia and owns, in whole or in part, approximately 445,124 electric distribution poles and approximately 457 streetlight-only poles.

- Potomac Edison serves approximately 409,000 customers in West Virginia and Maryland and owns, in whole or in part, approximately 431,558 electric distribution poles and approximately 2,774 streetlight-only poles.

- Toledo Edison serves approximately 311,000 customers in Ohio and owns, in whole or in part, approximately 242,155 electric distribution poles and approximately 4,074 streetlight-only poles.

- Ohio Edison serves approximately 1,050,000 customers in Ohio and owns, in whole or in part, approximately 601,381 electric distribution poles and approximately 22,579 streetlight-only poles.

- The Cleveland Electric Illuminating Company serves approximately 751,000 customers in Ohio and owns, in whole or in part, approximately 385,973 electric distribution poles and approximately 2,499 streetlight-only poles.

**The Hawaiian Electric Companies** - are composed of five separate isolated electric distribution grids (five separate islands), owned by three separate and distinct companies. Together they provide electric service to 460,000 customers. The Hawaiian Electric Companies own, in whole or in part, approximately 170,000 electric distribution poles.

- Hawaiian Electric Company, Inc. provides electricity to approximately 304,000 customers on the island of O'ahu. Hawaiian Electric owns, in whole or in part, approximately 63,200 electric distribution poles.

- Maui Electric Company, Limited, provides electricity to approximately 71,000 customers on the islands of Maui, Molokai and Lanai. Maui Electric Company owns, in whole or in part, approximately 26,500 electric distribution poles and approximately 7,150 streetlight-only poles.

- Hawai'i Electric Light Company, Inc. provides electricity to approximately 85,000 customers on the island of Hawaii. Hawai'i Electric Light Company owns, in whole or in part, approximately 58,000 electric distribution poles.

**Minnesota Power** – provides electric service to approximately 144,647 customers throughout a 26,000 square-mile service area in northeastern Minnesota. Minnesota Power owns 163,430 electric distribution poles and 13,072 streetlight-only poles.

**NorthWestern Energy**- provides electric service to approximately 427,000 customers in South Dakota, Nebraska, and Montana. NorthWestern Energy owns, in whole or in part,

approximately 332,775 electric distribution poles and approximately 59,300 streetlight-only poles.

**Puget Sound Energy**- provides electric service to approximately 1.1 million customers and natural gas service to approximately 790,000 customers in ten counties in Washington. Puget Sound Energy owns, in whole or in part, approximately 301,413 electric distribution poles and approximately 50,000 streetlight-only poles.

Altogether, the *Coalition of Concerned Utilities* serves approximately 24.5 million electric customers in 19 states and the District of Columbia, and owns, in whole or in part, approximately 12 million electric distribution poles and approximately 700,000 streetlight-only poles.

### B. Electric Utilities and Communications Company Pole Attachments

Electric utilities construct, operate and maintain millions of distribution poles that are used to deliver safe and reliable electric service to hundreds of millions of United States citizens throughout the country. Communications companies for many years have found these distribution poles convenient for the installation of equipment for their own cable television and telecommunications services, including wireless telecommunications services.

Electric utilities also construct, operate and maintain hundreds of thousands of streetlight-only poles that are used to deliver safe and reliable lighting services to municipal and private partners throughout the country.

Electric utilities and communications companies are two different industries with different missions and visions who increasingly share the same physical plant to distribute their services. In most cases electric utilities constructed, own, operate and maintain the distribution pole system while communications companies simply use it. While electric utilities are rate-

based companies focused on the safe and reliable distribution of their essential services, communications companies are motivated to deliver their services as quickly and competitively as possible, and are no longer traditionally cost-of-service rate-base regulated. Both electric utilities and communications companies strive to serve customers and improve communities, but there is a limit to how much utilities can subsidize communications deployments.

Electricity drives virtually all of the key components of modern life, and the safe and efficient delivery of electric utility services is dependent upon a highly complex, interrelated series of processes. The *Coalition* urges the Commission to give great deference to electric utilities and to the time-tested, longstanding standards they employ before imposing new regulations at the behest of attaching entities. Utility standards are vital to making electric grids safe and reliable and to ensuring the public is safe and properly served. They cannot be rejected because some find them inconvenient.

The *Coalition* supports, and is an active participant in, broadband and wireless deployments, but utilities cannot participate at the expense of what they consider to be the safe, reliable and efficient operation of utility distribution and streetlighting systems. We therefore submit these comments to address our concerns.

## III. COMMENTS

### A. It Would Violate the Pole Attachment Act and Be Counterproductive For the Commission to Begin Regulating Attachments to Streetlight-Only Poles

CTIA's Petition asks the Commission to "clarify" that the Commission has jurisdiction over attachments to streetlight-only poles.[5] As explained below, CTIA's position on jurisdiction is unsupported by the Pole Attachment Act, makes little sense from a practical perspective, and

[5] *CTIA Petition* at 21.

would be counterproductive in that it would cause electric utilities to stop expanding capacity to accommodate such attachments.

### 1. The Commission has no jurisdiction to regulate attachments to streetlight-only poles

The Pole Attachment Act grants the Commission jurisdiction to regulate attachments by cable television systems and telecommunications providers to "poles, ducts, conduits and rights-of-way" owned or controlled by a utility.[6]

CTIA's Petition reasons that streetlight-only poles owned or controlled by a utility are certainly "poles" and therefore must be subject to FCC jurisdiction.[7] The U.S. Court of Appeals for the Eleventh Circuit, however, disagrees. Overturning a Commission ruling asserting jurisdiction over attachments to electric transmission facilities, the court ruled that the Commission's jurisdiction was limited to attachments made to local distribution facilities: "The text of the statute, coupled with the presence of this reverse-pre-emption clause, make it plain that the Act's coverage was intended to be limited to the utilities' local distribution facilities, and was not to extend to the general regulation of interstate transmission towers and plant."[8]

The Commission itself has recognized that the requirement to provide nondiscriminatory access does not require utilities to provide access to any utility property that is not part of a distribution network: "We do not believe that section 224(f)(1) mandates that a utility make

[6] 47 U.S.C. §§ 224(a)(4) and (b)(1). "The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). "Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title." 47 U.S.C. § 224(b)(1).

[7] *CTIA Petition* at 23.

[8] *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002).

space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower .... The intent of Congress in section 224(f)(1) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."[9]

The Eleventh Circuit defined the utility distribution system as follows: "The third major component of an electric utility is the distribution system and is comprised of substations, underground cables, poles, overhead conductors, transformers, service drops, and meters that supply power to the customers."[10] As the term implies, streetlight-only poles supply only light, not power. They are therefore not part of the distribution system and not subject to Commission regulation.

Jurisdiction is lacking not only because the Pole Attachment Act requires the attachments to be made to electric distribution systems, but also because streetlight-only poles are not used for wire communications. The Act defines the term "utility" to mean entities whose "poles, ducts, conduits and rights-of-way" are "used, in whole or in part, for any wire communications."[11] Not only are streetlight-only poles not part of utility distribution systems, they also are not used for wire communications. In sum, streetlight-only poles are not the type of utility facilities the Act was intended to cover.

The Commission's pole attachment regulations themselves have always recognized that streetlight-only poles are outside Commission jurisdiction. The pole attachment rental rate

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[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16085 at ¶1185 (1996).

[10] *Southern Co. v. FCC*, 293 F.3d 1338, 1344 (11th Cir. 2002).

[11] 47 U.S.C. §224(a)(1).

formula, for example, requires utilities to identify pole costs using Account 364 from the Uniform System of Accounts.[12] The costs associated with streetlight-only poles, however, are reported in Account 373, not Account 364, and Account 373 is nowhere mentioned in the Commission's formula.

Moreover, the Uniform System of Accounts instructions recognize that Account 373 is not part of the utility distribution system.[13] For Account 373 ("Street lighting and signal systems"), the instructions require: "This account shall include the cost installed of equipment used wholly for public street and highway lighting or traffic, fire alarm, police, and other signal systems."[14] The instructions for Account 364 ("Poles, towers and fixtures"), on the other hand, require the inclusion of costs associated with electric distribution: "This account shall include the cost installed of poles, towers, and appurtenance fixtures used for supporting overhead distribution conductors and service wires."[15]

CTIA's Petition, therefore, mistakenly requests a "clarification" of FCC jurisdiction, when instead what CTIA is really seeking is a completely new interpretation of Commission regulations, which is contrary to the Pole Attachment Act and the Eleventh Circuit's interpretation of the Act.

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[12] *See In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12174, App. E-2 (2001).

[13] The instructions require the following to be included in Account 364 ("Poles, towers and fixtures"): "This account shall include the cost installed of poles, towers, and appurtenance fixtures used for supporting overhead distribution conductors and service wires." The instructions require the following to be included in Account 373 ("Street lighting and signal systems"): "This account shall include the cost installed of equipment used wholly for public street and highway lighting or traffic, fire alarm, police, and other signal systems."

[14] 18 C.F.R. Part 101, 373 Street lighting and signal systems.

[15] *Id.* at 364, Poles, towers and fixtures.

### 2. Accommodating attachments to streetlight-only poles is far more complicated than accommodating attachments to electric distribution poles

As the following analysis explains, accommodating wireless attachment installations on streetlight-only poles is expensive, complicated, and time consuming, and requires the dedication of considerable utility resources. But this time, expense, and diversion of resources is currently being devoted to installing wireless facilities on many utility streetlight-only poles, and only because installations on these poles are unregulated. Utilities' willingness to take on the added challenges of accommodating requests is likely to be inversely proportional to the weight of regulatory complications. As Chairman Pai explained: "It's basic economics: The more heavily you regulate something, the less of it you're likely to get."[16]

#### *a) Streetlight-only poles almost always must be replaced because they are engineered and designed only to hold a streetlight*

Streetlight-only poles are designed and engineered for the use they were installed to accommodate, which is to support a lighting fixture that illuminates a certain area. As a result, the streetlight-only poles to which CTIA seeks regulated access are not load rated for any additional attachments other than lighting. Because the existing pole is not designed for the additional load associated with a wireless antenna and its associated equipment, accommodating the attachment of such facilities would require replacement of the pole and potentially the pole's foundation to support the wireless facilities.[17] If not, the addition of extra materials to existing streetlight-only poles that exceed these structural ratings would invalidate manufacturer

[16] Remarks of FCC Chairman Ajit Pai at the Newseum, "The Future of Internet Freedom," Washington, DC (April 26, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf.

[17] Arizona Public Service, for example, requires that the proposed wireless antennas be wind tested to withstand wind ranging from 5 mph to 125 mph with no damage using approved mounting kits and arms, among other testing.

warranties and cause considerable harm and liability if they fall over and cause property damage or injure or kill someone.

In addition to loading concerns, streetlight-only poles must be redesigned and replaced because they were not designed or installed to provide access for fiber, to mount equipment, to conceal equipment, to disconnect power, or to provide necessary National Electrical Safety Code ("NESC") clearances, all of which wireless attachments require. Additionally, most streetlight-only poles do not have separate raceways in which to run communications fiber separate from electric power, as required by the NESC.

For all of these reasons, it is generally expected that all attachments to streetlight-only poles will require a pole replacement, and the new pole must be custom designed and engineered to accommodate the additional equipment and weight. And because these replacement poles are unique, utilities may require communications companies seeking to attach to these specially-engineered poles to make available spare poles in the event the new specially-designed pole is damaged in an accident.

Although the additional load, additional facilities and reengineering required for antenna installations would require streetlight-only poles to be replaced anyway, aesthetic concerns would otherwise require their replacement. Private area lighting customers pay utilities for poles that are decorative and that meet their desired aesthetics. Most municipalities have distinctive street lighting standards, which might include specifications regarding pole color, material, size, design, and other factors. All of these factors require considerable effort and coordination between the utility, the municipality, and the various manufacturers to determine a suitable solution for accommodating such new attachments.

Representative photographs of a small sampling of the dozens, if not hundreds, of streetlight-only pole styles illustrate many of these characteristics and limitations, and are attached hereto at Attachment 1.

*b) It is very expensive and time-consuming to install wireless facilities on streetlight-only poles, and to supply electricity to those sites*

Streetlights are powered by streetlight-only electric circuits that have minimal electric capacity and limited capabilities for metering. Streetlights can be powered by different sized electrical conductors (#10, #6, 1/0, 4/0, 350, etc.) to the luminaire, and the load and amperage needed to power the luminaire will determine the proper conductor size in order to avoid voltage drop/flicker. In order to provide sufficient power to operate new antenna or other equipment, utilities often need to run a larger secondary conductor to the pole.

Because in many cases the service must be run underground, considerable construction activity is required to install the electricity supply equipment. This construction is in addition to the considerable construction required already just to replace the pole. Sidewalks, streets, parking lots and rights-of-way must often be torn up, removed and replaced in order to install new electric service to the pole. And accomplishing this type of major infrastructure addition requires significant amounts of time, money and cooperation between antenna owners, municipal leaders, property owners and utility engineers.

Sometimes finding a power source for the new small cell equipment is challenging. Often the utility's distribution facility is within an easement located to the rear of the property while the streetlights are typically located in the front or side of the property, separate from the utility easement. Sometimes there is no electricity located a reasonable distance from the pole. Power run lengths of 10,000 feet can be required in certain areas, such as colleges or downtown

urban areas that are currently being fed with only primary (not the necessary secondary) circuits. Where streets are compact and transformers are not conveniently located, it is often difficult to find a route that doesn't impede on other users. Even under the best circumstances, navigating through existing underground utilities is challenging and very costly.

In metropolitan areas, where sidewalks and streets (and oftentimes parking lots) must be torn up, removed and replaced, the technical problems associated with such work to supply this new power can add weeks or months to a project, in addition to delays associated with obtaining municipal permits. And not only is removing sidewalks and parking lots very expensive and time consuming, it also has a substantial impact on pedestrian safety and property owner business operations.

*c) Other issues make it difficult for electric utilities to accommodate wireless attachments on streetlight-only poles*

In order for utilities to manage the work associated with the attachment of wireless facilities to streetlight poles, they must increase available resources to staff the additional engineering, design, project management, real estate, and construction work associated with accommodating such wireless attachments.

Even with proper incentives, the ability of utilities to increase available resources to perform this work is often limited by a shortage of qualified workers. With the increased demand for 4G and 5G wireless installations on electric distribution poles, many utilities are already challenged to provide qualified workers for this expansion and to keep up with the utility's regular business needs. Other areas of the country, particularly California, have been offering substantial overtime and daily per diem packages that make it difficult to hold on to contractor work forces in the Midwest and elsewhere. Utilizing utility in-house crews for this

expanded workload is not viable because utilities are often working those crews overtime already.

Unique safety concerns also exist with wireless attachments to streetlight-only poles, such as additional contact voltage on streetlight poles because the wireless antennas could back-feed the pole.

Accommodating attachments to streetlight-only poles creates other, less obvious, expenses. The unique designs and numerous varieties of re-engineered streetlight-only poles require utilities to stock a variety of different poles. Streetlight-only poles are now not part of the pole testing, treating and replacement programs of many utilities, and would need to be added. Such poles must also be added to utility electronic application and notification systems.

Finally, as is easy to imagine, aesthetic concerns and community objections abound when additional attachments are added to streetlight-only poles. No electric utility customer requests that six-foot steel boxes be placed in their yard, and many customers facing such installations will object to any venue that will listen. Not only is the appearance of antennas and associated equipment on streetlight-only poles objectionable from an appearance standpoint, utilities have needed to relocate pole sites based on citizen concern of RF radiation.

For all of these reasons, accommodating wireless attachments on streetlight-only poles requires a very strong commitment on the part of electric utilities. Currently, many utilities, including many *Coalition* members, are willing to make that commitment because the process is unregulated. This unregulated environment allows the parties to work through the numerous delays and operating challenges, allows utilities to staff up when possible to address these challenges, and creates incentives for utility pole owners to undertake the extraordinary effort and expense required to accommodate such installations.

### 3. Under a regulated environment, with no benefit, utilities will find it is not worth the effort to replace streetlight-only poles, to supply additional electricity, and otherwise to expand capacity to accommodate wireless attachments on such poles

This willingness of electric utilities, including many *Coalition* members, to meet the numerous challenges associated with wireless installations on streetlight-only poles would be eliminated with regulated rates, terms and conditions. Regulated rates, terms and conditions, even if the Commission had jurisdiction to adopt them, conceivably would establish unrealistic and unreasonable make-ready deadlines with little compensation, thereby eliminating their incentive to participate in this burdensome process.

Since accommodating wireless attachments on streetlight-only poles almost always requires a pole replacement, utilities likely will decide not to replace such poles at all rather than become subjected to burdensome regulations with little compensation.

The Pole Attachment Act clearly allows utilities to deny access to their facilities for lack of capacity:

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[18]

By anyone's measure, the replacement of existing streetlight-only poles with new, stronger, and often taller poles with expanded capabilities to accommodate not only streetlights but also wireless antennas and associated equipment, constitutes an expansion of capacity.

That utilities need not expand capacity to accommodate attaching entities has been upheld repeatedly by the Eleventh Circuit. In *Southern Company v. FCC*, utility petitioners

[18] 47 U.S.C. §224(f)(2) (2010).

objected to the Commission's 1999 decision that "utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments."[19] The Eleventh Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: "When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'"[20] The court further noted that "the FCC's attempt to mandate capacity expansion is outside of its purview under the plain language of the statute."[21]

The *Southern Company* decision was repeated by the Eleventh Circuit in *Alabama Power v. FCC*:

> A panel of this court recently used this statutory exception as the basis for vacating an FCC rule which forced power companies to enlarge pole capacity at the request (and expense) of attaching cable and telecommunications companies. See *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). The panel could not reconcile the no-capacity excuse allowed under the statute with the forced build-out rules required under the FCC's regulations, and thus held the regulations to be *ultra vires*.[22]

*Alabama Power* also cited Congressional intent: "Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime."[23] Neither case needed to proceed past the first prong of the *Chevron* test[24] for

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[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd,* Order on Reconsideration, 14 FCC Rcd 18049 (1999), *rev'd in part, Southern Co. v. FCC,* 292 F.3d 1338, 1347 (11th Cir. 2002).

[20] *Southern Co.. v. FCC.*, 292 F.3d 1338, 1347 (11th Cir. 2002).

[21] *Id.*

[22] *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1364 n. 8 (11th Cir. 2002).

[23] *Id.* at 1370.

[24] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1984).

reviewing the FCC's interpretation of the statute as both times the court determined Congressional intent was unambiguous in Section 224(f).

Applying this judicial precedent, the Commission has indicated repeatedly that utilities need not expand capacity to accommodate attachers. In its *April 2011 Pole Attachment Order*, the Commission explained: "[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority . . . The 'terms and conditions' of pole attachment encompass the process by which new attachers gain access to a pole, and setting deadlines and remedies for that process in no way constitutes a mandate to expand capacity."[25]

The *Southern* decision specifies that utility pole owners need not replace poles for attachers at all, including in situations where they would replace poles for themselves. This "nondiscrimination" argument is precisely the argument that the FCC used in the 11th Circuit and that the court struck down.[26]

In short, attachments to streetlight-only poles are being installed at a reasonable pace already in the absence of Commission regulation, consistent with market forces that have been able to resolve the numerous complex and difficult challenges associated with them. The Pole Attachment Act does not grant the Commission jurisdiction over attachments to such poles, but

[25] *April 2011 Pole Attachment Order*, 26 FCC Rcd 5240, 5284 at ¶95 (2011).

[26] *Southern Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002) ("The FCC counters this argument by noting that many utilities now use their poles to support thriving telecommunications businesses of their own … and suggests that the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from 'favoring itself over other parties with respect to the provision of telecommunication or video programming services.' *First Report and Order, 11 FCC Rcd 15499, para. 1157* (Aug. 1, 1996). … The FCC's position is contrary to the plain language of § 224(f)(2). While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to 'give effect, if possible, to every clause and word of a statute.'… Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers."

even if it did, such regulation would have the effect of stopping such progress. Regulation of wireless attachments to streetlight-only poles would therefore be counterproductive.

#### 4. Regulation of attachments to streetlight-only poles would be complicated

Even if the Commission had jurisdiction, and even if utilities were somehow incentivized under regulated rates, terms and conditions to expand capacity and bear the considerable burden to accommodate attachments to streetlight-only poles, FCC regulation of such attachments would be complicated.

Make-ready deadlines would not work with streetlight-only poles. Because streetlight-only poles need to be replaced with specially designed poles, because they often require specially-designed material that is not in stock, because new upgraded electricity (and communications fiber) must be routed to these former streetlight-only facilities, because sidewalks, streets and parking lots must be torn up, removed and replaced, and because other operational constraints are created by accommodating wireless attachments to streetlight-only poles, there is little chance any FCC make-ready deadlines could be met. Design and cost estimates alone from pole manufacturers take 4-6 weeks at a minimum. And following this delay, once a carrier approves the necessary pole replacement with a new, specialized pole, it can take anywhere from 10-12 weeks to receive the poles and other materials.

Should anyone seek to string overhead fiber from streetlight-only pole to streetlight-only pole, they would encounter numerous additional jurisdictional codes, engineering, operational and aesthetic issues associated with loading, clearances, guying, pole locations, proper streetlighting, and citizen oppositions, all of which are compounded by the limitless variety of streetlight-only poles and locations.

The Commission has never analyzed the process associated with attachments to streetlight-only poles, and so a rulemaking would be required to understand the operational issues. In addition, the Commission has never analyzed annual rental rates that might be appropriate for such attachments. As first noted above, the costs associated with streetlight-only poles are not identified in Account 364 but rather in Account 373, which is not currently part of the Commission's formula and certainly not part of the rebuttable presumptions used in the formula. And since there are numerous varieties of streetlight-only poles, more than one rental rate formula and more than one operating process might need to be developed. Altogether, it might take a decade of work for the Commission to develop adequate rates and other regulations to cover attachments to streetlight-only poles.

### B. Utility Standards Regarding Attachments to the "Unusable" Space Should Be Respected

CTIA's Petition claims that utilities deny access to the so-called "unusable" space on poles without adequately citing a safety or reliability risk on a pole-by-pole basis. CTIA claims that blanket refusals to access this "unusable" space should be prohibited.[27]

If CTIA is seeking access to the "unusable" space on poles despite utility standards to the contrary, its request should be denied. As explained below, the Commission instead should affirm that each utility's standards, which were designed to ensure the safe and efficient operation of its electric distribution system, must control the types of equipment (if any) permitted to occupy this "unusable" space.

[27] *CTIA Petition* at 26-27.

### 1. Utility standards should be presumed reasonable

Utility engineering, operating and design standards have been developed over the course of decades as experience and engineering require. The question of which equipment should be allowed on poles, like other questions regarding the safe and efficient operation of the electric distribution system, requires analysis of a complex web of interrelated safety and reliability factors, based on a hundred years of solving such challenges. Moreover, such standards have guided the construction of billions of dollars in utility plant investment and been subjected to countless regulatory reviews for prudency and usefulness by state public utility commissions. They cannot and should not be cavalierly dismissed.

Although the NESC is a valuable resource, the NESC is a minimum safety standard.[28] As it explains at the beginning of Section 1, it is not an operational guide or a design manual: "This Code is not intended as a design specification or as an instruction manual."[29] And it does not account for the different working processes developed over time by each utility in the best interests of the safety, reliability and engineering of its system and the safety of personnel in and around its facilities. Instead, the NESC directs utilities to apply accepted best practices based on the utility's own unique conditions: "For all particulars not specified, but within the scope of these rules, as stated in Rule 011A, construction and maintenance should be done in accordance with accepted good practice for the given local conditions known at the time by those responsible for the construction or maintenance of the communication or supply lines and equipment."[30]

[28] It should also be noted that different versions of the NESC are applicable in different states.

[29] 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.C. at Pg. 1 (Apr. 26, 2016).

[30] *Id*. at 012.C. at Pg. 4.

Any utility standards that might exceed the NESC, or that impose requirements not covered by the NESC, were established by the utility based on the utility's commitment to worker safety and to electric service reliability, and to meet its obligations to the community. For example, the NESC has established several different ice loading standards for different geographic areas, but if a utility's service territory happens to be on both sides of that NESC line, the utility may adopt the more stringent NESC standard and apply it throughout its service territory to improve reliability and ensure uniformity across its system. As another example, utilities have adopted standardized materials that often exceed NESC minimums in order to reduce overall costs by reducing material choices and stocking. Standards like these exceed NESC minimums but are necessary for the safe, efficient and reliable provision of electric service.

### 2. Utility standards prohibiting attachments in the "unusable" space are justified for safety, reliability and generally applicable engineering reasons

Requests to attach in the so-called "unusable" space on poles were infrequent until recently when wireless companies began seeking to install large quantities of their equipment on every pole to which they also attach an antenna. The term "unusable" is ubiquitous throughout FCC regulations and adjudications. CITA is requesting that the Commission abruptly eliminate the concept, by directing that the space instantly become "usable."

Utilities generally prohibit attachments in the "unusable" space because of fall hazards, climbing obstructions, and efficiency of pole replacements. All of these are associated with a safety, reliability or generally applicable engineering goal, and as such the Pole Attachment Act allows utilities to impose such prohibitions.[31]

[31] *See* 47 U.S.C. §224(f)(2).

The joint use engineering, operating and design standards of some *Coalition* members prohibit attachments in the so-called "unusable" space. Other *Coalition* members permit such attachments in a way that is limited by their standards.

FirstEnergy's standards, for example, prohibit enclosures exceeding 110 cubic inches from being attached to the pole. Other, larger equipment must be located at least eight feet from the pole, although 15 feet is preferred. FirstEnergy standards CS 03-305 (antennas on secondary poles) states:

> (1) No meters, battery boxes, power supplies, or anything except antenna and cable interface enclosures, which do not exceed 110 cubic inches, may be placed on the pole
>
> (2) Recommended distance of associated pedestals (or equivalent structures) is 15' from the base of the pole. Pedestals shall not be within 8' of pole[32]

FirstEnergy developed its standard based on its own experiences operating its electric distribution systems. FirstEnergy began using fall protection systems in the mid-1990s, ahead of many utilities. This was because of the number of injurious falls incurred by Ohio Edison personnel. Installations on the pole that were too big and too close to the pole required personnel climbing the pole to unbuckle their harnesses. Without the change in standard they could not get their fall arrest devices around the equipment without unbuckling. Sharp corners on this equipment were another problem because they caused tears in dielectric rubber gloves, allowing electricity to flow through.[33]

Moreover, proper anchoring of attached facilities is necessary to assure that a line worker will not fall further. Not all of the attachments proposed by wireless companies have that much

[32] FirstEnergy Construction Standard 3-305, attached hereto at Attachment 2, Exhibit A.

[33] Declaration of Randal J. Coleman at ⁋5 , attached hereto at Attachment 2.

holding capacity and even if they did, FirstEnergy cannot be certain they will be maintained by the wireless companies. In addition, during storm restoration, reliability standards imposed by state lawmakers and enforced by state regulators require FirstEnergy to minimize outages. Every box in the "unusable" space slows down electricity restoration time. If FirstEnergy were to need a truck to get around equipment that was installed in the "unusable" space, it would take on average an additional hour, when a lineman could otherwise have climbed the pole in no time.[34]

Pole replacements are also a concern when large pieces of equipment are affixed to the pole. Because of such congestion, the replacement pole must be installed further away from the old pole. Eventually this will cause uneven spans to the aerial conductors which will result in additional engineering issues for FirstEnergy's system.[35]

Too much equipment on the pole also inhibits effective ground line inspections because it increases the areas on the pole where inspectors cannot drill to evaluate the condition and remaining strength of the pole.[36]

FirstEnergy therefore implemented its standard limiting the size of equipment that can be installed on the pole, and as it merged with other utilities that requirement was rolled out for all of its other utilities.[37]

Since implementing its fall protection systems and implementing its standard, fall injuries on FirstEnergy systems have virtually ended when a fall protection restraint is used properly.[38]

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[34] *Id.* at ¶6.

[35] *Id.* at ¶7.

[36] *Id.* at ¶8.

[37] *Id.* at ¶9.

[38] *Id.* at ¶10.

In this proceeding, some wireless communications companies might propose a solution for allowing utilities to accommodate larger equipment on poles, but FirstEnergy's continuing concern is that with so many new installations, with so many new players, and with so much new activity, FirstEnergy will not be able to police all of this new equipment in order to be sure its linemen are safe, that its poles can easily be climbed, and that its service can be properly restored in a timely manner.[39]

Some attaching entities might point out that utilities have allowed others to attach facilities in the "unusable" space or that utilities sometimes attach their own equipment in the "unusable" space. There are three primary explanations for these attachments. First, new standards have sometimes been adopted for prospective attachments only, leaving older attachments in place. Second, some *Coalition* members have acquired other utilities over the years, which have had other practices. For these acquired utilities, it is not practical to make across-the-board changes overnight to bring the entire system into the combined best practice standard, but these utilities continue to work in that direction at a respectable pace. Third, many if not all *Coalition* members also have a minimal amount of attachments located in the "unusable" space that is necessary to operate the electric system, such as control boxes, radios, switch handles, transitions, and old-style air brakes. The system was constructed by a regulated electric utility to be an electric distribution system, and the limited installation of this equipment is necessary for engineering reasons to run the system—in sharp contrast to a non-discriminatory right of access by any and all providers of telecommunications services.

[39] *Id*. at ¶11.

### 3. CTIA's proposal is asking the Commission to require professional engineers to violate their code of conduct

There is another point to consider with respect to utility standards and CTIA's request to ignore them. Utility standards are developed under the guidance of registered professional engineers, and professional engineers are bound by a code of ethics. The National Society of Professional Engineers' Code of Ethics specifies the level of integrity that is expected of professional engineers in its preamble:

> Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.[40]

First in the list of "Fundamental Canons" is the requirement to "[h]old paramount the safety, health and welfare of the public."[41] And listed among the "Rules of Practice" is the requirement that "Engineers shall approve only those engineering documents that are in conformity with applicable standards."[42]

By asking the Commission to ignore utility standards, CTIA's proposal is essentially asking utility professional engineers to violate their code of ethics.

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[40] National Society of Professional Engineers, Code of Ethics for Engineers, Preamble, available at https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/NSPECodeofEthicsforEngineers.pdf.

[41] *Id*. at I, 1.

[42] *Id*. at II, 1(b).

#### 4. Alternatives exist to attaching equipment in the "unusable" space

Although CTIA's Petition claims attachments in the "unusable" space are "crucial,"[43] they actually are not, considering that alternatives exist. First, wireless companies, like all other entities, can place their equipment in pedestals in the right-of-way instead of on the poles. Second, wireless companies can strand-mount their wireless facilities and associated equipment, where feasible and permitted by the utility's construction standards. And third, many states permit wireless carriers, like other telecommunications carriers, to install their own poles in the right-of-way which can accommodate such attachments. Twenty-eight states recently have enacted new "small cell" legislation to streamline permitting and limit municipalities from denying placement of wireless facilities in the public rights-of-way. These new laws should be given time to enhance deployment as designed before running roughshod over utilities' construction standards.

### C. The Commission Should Not Mandate That Pole Attachment Contracts Never Differ From FCC Regulations

CTIA's Petition seeks a "clarification" that utilities cannot seek terms that conflict with the pole attachment rules.[44] This request for "clarification," however, is mistaken because the Commission already has "clarified" the opposite; that parties may enter into agreements that differ from FCC rules. And as explained below, the Commission's clarification on this topic makes both good business sense and good regulatory sense.

[43] *CTIA Petition* at 27.

[44] *CTIA Petition* at 28-31.

### 1. The Commission's rules already are clear that parties may enter into agreements that differ from FCC rules.

CTIA's Petition itself quotes the following language from the *August 2018 OTMR Order*, which reiterates the Commission's longstanding rule that parties to a pole attachment agreement may agree to terms and conditions that differ from published Commission rules:

> [W]e emphasize that parties are welcome to reach bargained solutions that differ from our rules. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions from themselves through voluntary privately-negotiated solutions.[45]

In reaching this determination, the Commission cited with approval the *Coalition*'s comment encouraging a ruling that "utilities and attachers be free to agree on their own one-touch make-ready process," and cited with approval the comment of *Coalition* member Hawaiian Electric that "[W]here parties have reached bargained solutions that differ from the Draft Order … the terms of the collaborative, negotiated agreement control."[46] Equally clear, the Commission rejected a Crown Castle request "that would limit the scope of mutually bargained-for attachment solutions."[47]

The Commission's rules thus are abundantly clear that parties may enter into agreements that differ from FCC rules. No "clarification" that the opposite is true is either necessary or appropriate.

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[45] *Accelerating Wireline Broadband Deployment by Removing Barriers to infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711 at ¶13 (2018) [footnotes omitted].

[46] *Id.* at n.54, 55.

[47] *Id.* at n. 55.

### 2. CTIA's proposal is largely a solution in need of a problem.

CTIA's proposal that agreements never differ from Commission rules is also a solution in need of a problem. Although parties are entitled to agree on contract terms that differ from Commission rules, both parties also understand during contract negotiations that the Commission will apply its regulations if a complaint is ever filed. Further, the Commission's 'sign and sue' policy is more than sufficient remedy if individual terms and conditions stray beyond reasonableness. The fact that so few pole attachment complaints have been filed over the years is proof that allowing parties to negotiate their own terms works.

### 3. FCC regulations and precedent are capable of different interpretations, and contract negotiations enable the parties to reach compromise solutions

Not all FCC regulations, orders, comments and other guidance are hard and fast, black and white rules. A great deal can still be left to interpretation.

As an example, Mediacom Communications Corporation in 2014 filed a Petition in WC Docket No. 14-52, seeking a declaratory ruling that a nonreciprocal indemnification clause in a pole attachment agreement was not "just and reasonable." The parties to that proceeding disputed that issue, providing completely different analyses of Commission precedent. Mediacom and other attachers argued Commission precedent restricted such indemnification clauses and utilities argued Commission precedent allowed them. The Petition was eventually withdrawn.

Courts too would have a difficult time enforcing contracts if they must also first determine whether they comport with FCC rules. The Commission, not the courts, should be the adjudicatory body to determine what the Commission's rules state. Courts should not have to

perform this function, and so granting CTIA's request might cause many more judicial contract disputes to be transferred first to the Commission to interpret Commission rules.

In short, it would generate conflict and confusion if the parties to attachment agreement were free to disregard contract provisions in favor of whatever interpretation of Commission rules they deemed appropriate. It is far better to retain the current system, whereby the Commission alone is able to make that determination.

#### 4. Differing locations, differing utility distribution systems, and differing state regulatory environments require flexibility in contract negotiations

Flexibility in contract negotiations is required for a variety of reasons, but one very important reason is because different utilities are located in different places, with different regulatory requirements, with different operating conditions, with different attaching entities, with different personnel, and with different attachment processes. There is no one size fits all.

The Hawaiian Electric Companies provide a dramatic but illustrative example. More than most utilities, Hawaiian Electric encounters issues and conditions requiring considerable flexibility that FCC rules alone cannot provide. A partial list of these issues and conditions includes the following:

i. The three operating companies cover five Hawaiian islands, and each island has its own grid with no interconnection ability between islands or the mainland;

ii. Without interconnection of electricity supply, the Hawaiian Electric Companies' reliability, resiliency and sustainability needs and challenges are amplified;

iii. Each island has minimal pole inventory space, and when additional poles are needed, they have to be transported trans-Pacific by barge, pursuant to pre-established barging schedules, leading to dramatically longer lead times than utilities are accustomed to on the mainland;

iv. Qualified and licensed contractors are already in very short supply, so increases in demand typically result in the use of mainland contractors, resulting in increased transportation cost, time, and scheduling logistics, particularly with respect to barging specialized contractor equipment, which is too large to accompany a contractor by flight;

v. The short supply of licensed contractors has already shown to be a considerable impediment to Hawaii's ability to comply with the Commission's One-Touch Make-Ready directive;

vi. The Hawaiian Electric Companies' streetlights are on a different island than its base of operations, which requires employees to travel to another island for even the simplest of site visits when streetlight attachments are involved;

vii. The State of Hawaii Public Utility Commission ("Hawaii PUC") has jurisdiction over all leases of the Hawaiian Electric Companies' assets, which includes pole attachment licenses, requiring that said agreements appropriately account for the Hawaii PUC's interests in sustainability (reaching the State's 100% renewable energy mandate by 2045) and controlling ratepayer costs (as Hawaii has among the highest, if not the highest, electric rates in the country);

viii. For historic cultural reasons, Hawaiians and their political representatives place a tremendous value on preservation of Hawaii's natural beauty and aesthetic concerns, including for example, a statutory prohibition of billboards for the entire state, and a Hawaii PUC requirement that, every time the Hawaiian Electric Companies install or replace a taller or wider utility pole, surrounding residents be notified and given an opportunity to object;

ix. Because of the year-round tropical climate, Hawaii faces termite control and vegetation control issues unlike any other U.S. state;

x. Hawaii's remote and water-bound ecosystem includes numerous protected species of vegetation, insects, birds and bats, so pole construction and replacement projects can raise unique environmental concerns, including one recent lawsuit against Maui Electric Company, Limited and the County of Maui, alleging that a streetlight replacement project endangered both seabirds and newly-hatching sea turtles;

xi. Similarly, due to the history of the State, pole construction and replacement projects can raise unique architectural and cultural-sensitivity issues, as it is common for construction crews to uncover indigenous artifacts and human remains. In those circumstances, the Hawaiian Electric Companies must cease all work and strictly follow cultural protocols mandated by the State Historic Preservation Division of the Department of Land and Natural Resources; and

xii. As a heavily-visited island state, Hawaii's infrastructure in its densely-populated urban areas are overloaded, but in addition attachment space on sparse infrastructure in rural areas is also in very high demand because those remote areas are frequented by tourists.

For all of these reasons, pole attachment agreements in Hawaii must include a number of provisions that account for these circumstances, and some of these provisions might not comply with the letter of Commission regulations. Realizing the differences and unique challenges in

Hawaii, attachers too are more inclined to negotiate an arrangement that works for everyone. These additional provisions, that might somehow be contrary to FCC rules, nevertheless are necessary in order to accommodate attachment requests and fulfill the Commission's policy of promoting 5G and broadband.

Finally, for very good reasons, the Commission has never created a template pole attachment agreement that every utility and attacher in the country must use, and so every agreement for every utility in the country is different. FirstEnergy, for example, administers over two thousand individual agreements with addenda. It is very likely that every single one of these and thousands of other pole attachment agreements between other utilities and attachers varies in some way from FCC regulations.

#### 5. Allowing for some give and take in contract negotiations is the best way to ensure the parties will work cooperatively

Although many contract provisions that differ from Commission rules are necessary to address local operating conditions, personnel, resource availability, environmental constraints, and local regulation, other contract provisions are entered into by pole owners in order to provide benefits to attaching entities that might offset provisions attaching entities might deem less favorable. To cite the most obvious example, many pole attachment agreements commit to adding capacity for attaching entities by replacing poles where feasible. The flexibility to negotiate that commitment is a huge benefit to attachers, which might be eliminated with some new requirement that agreements must strictly adhere to Commission regulations.

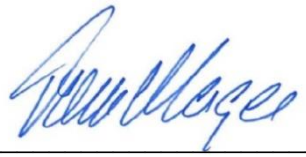
## IV. CONCLUSION

**WHEREFORE, THE PREMISES CONSIDERED**, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

**COALITION OF CONCERNED UTILITIES**

**Arizona Public Service Company**
**Evergy**
**Eversource Energy**
**Exelon Corporation**
**FirstEnergy**
**Hawaiian Electric Companies**
**Minnesota Power**
**NorthWestern Energy**
**Puget Sound Energy**

By: 

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***Coalition of Concerned Utilities***

**October 29, 2019**

# ATTACHMENT 1


WATERMAR
BOOK CO.


PACIFIC
MARINE CENTER
YIELD

# ATTACHMENT 2

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **In the Matter of** | **)** | |
| | **)** | |
| **Accelerating Wireline Broadband** | **)** | **WC Docket No. 17-84** |
| **Deployment by Removing Barriers** | **)** | |
| **To Infrastructure Investment** | **)** | |

## DECLARATION OF RANDAL J. COLEMAN, P.E.

I, Randal J. Coleman, declare as follows:

1. My name is Randal J. Coleman. I am a Professional Engineer licensed in the State of Pennsylvania.

2. I am currently the Manager of Distribution Standards and the EOC Logistics Support Branch Director at FirstEnergy. I make this declaration in support of the Comments of the *Coalition of Concerned Utilities* in the above-captioned proceeding.

3. FirstEnergy's joint use engineering, operating and design standards, attached hereto as Exhibit A, prohibit enclosures exceeding 110 cubic inches from being attached to the pole. Other, larger equipment must be located at least eight feet from the pole, although 15 feet is preferred.

4. FirstEnergy's standards CS 03-305 (antennas on secondary poles) states:

   (1) No meters, battery boxes, power supplies, or anything except antenna and cable interface enclosures, which do not exceed 110 cubic inches, may be placed on the pole

   (2) Recommended distance of associated pedestals (or equivalent structures) is 15' from the base of the pole. Pedestals shall not be within 8' of pole

5. FirstEnergy developed its standard based on its own experiences operating its electric distribution systems. FirstEnergy began using fall protection systems in the mid-1990s, ahead of many utilities. This was because of the number of injurious falls incurred by Ohio Edison personnel. Installations on the pole that were too big and too close to the pole required personnel climbing the pole to unbuckle their harnesses. Without the change in standard they could not get their fall arrest devices around the equipment

without unbuckling. Sharp corners on this equipment were another problem because they caused tears in dielectric rubber gloves, allowing electricity to flow through.

6. Proper anchoring of attached facilities is necessary to assure that a line worker will not fall further. Not all of the attachments proposed by wireless companies have that much holding capacity and even if they did, FirstEnergy cannot be certain they will be maintained by the wireless companies. In addition, during storm restoration, reliability standards imposed by state lawmakers and enforced by state regulators require FirstEnergy to minimize outages. Every box in the "unusable" space slows down electricity restoration time. If FirstEnergy were to need a truck to get around equipment that was installed in the "unusable" space, it would take on average an additional hour, when a lineman could otherwise have climbed the pole in no time.

7. Pole replacements are also a concern when large pieces of equipment are affixed to the pole. Because of such congestion, the replacement pole must be installed further away from the old pole. Eventually this will cause uneven spans to the aerial conductors which will result in additional engineering issues for FirstEnergy's system.

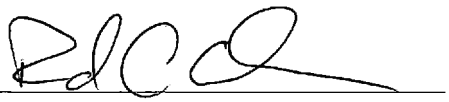
8. Too much equipment on the pole also inhibits effective ground line inspections because it increases the areas on the pole where inspectors cannot drill to evaluate the condition and remaining strength of the pole.

9. FirstEnergy therefore implemented its standard limiting the size of equipment that can be installed on the pole, and as it merged with other utilities that requirement was rolled out for all of its other utilities.

10. Since implementing its fall protection systems and implementing its standard, fall injuries on FirstEnergy systems have virtually ended when a fall protection restraint is used properly.

11. In this proceeding, some wireless communications companies might propose a solution for allowing utilities to accommodate larger equipment on poles, but FirstEnergy's continuing concern is that with so many new installations, with so many new players, and with so much new activity, FirstEnergy will not be able to police all of this new equipment in order to be sure its linemen are safe, that its poles can easily be climbed, and that its service can be properly restored in a timely manner.

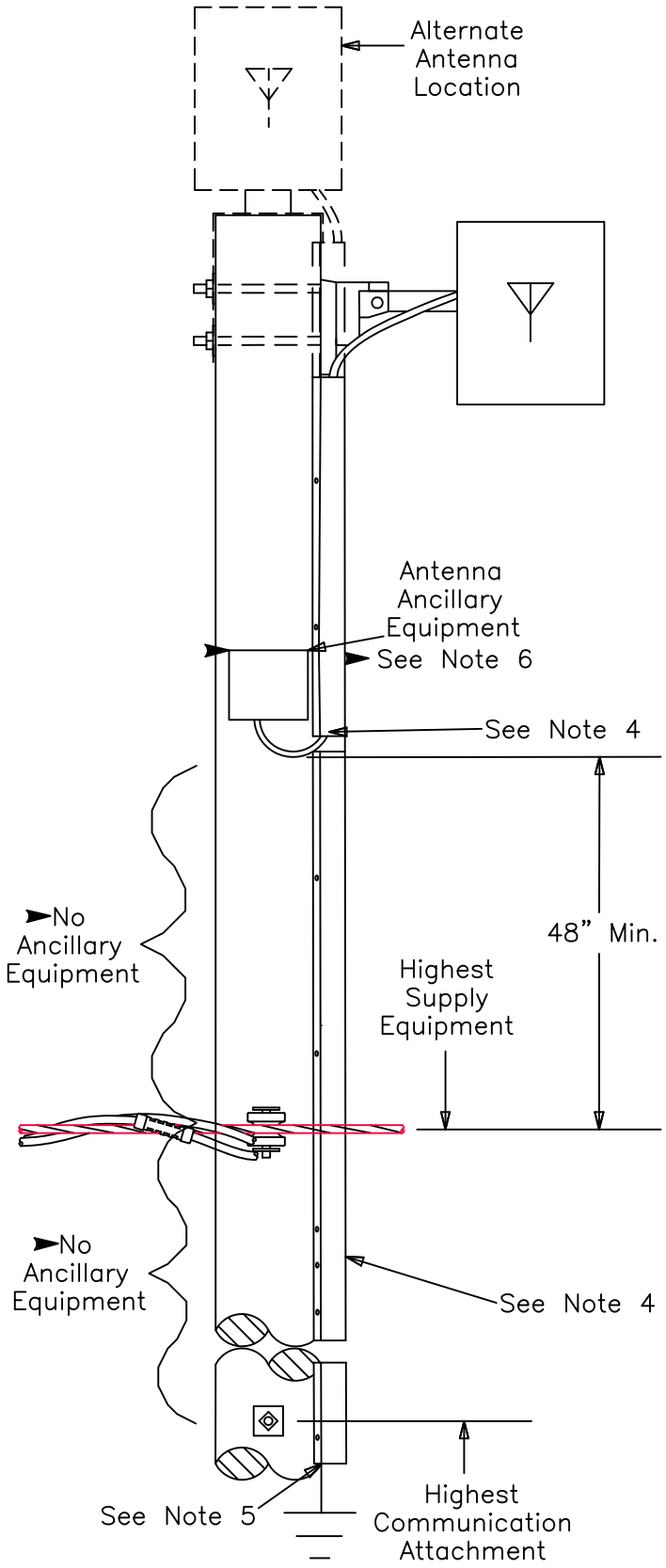
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

By: 

Randal J. Coleman, P.E.
Manager, Distribution Standards
FirstEnergy

Dated: October 29, 2019

# EXHIBIT A




Notes:

1. The antenna shall be mounted within the top 12" of the pole.
2. Pole top extensions shall not be not allowed.
3. Visible open switching of power supply and battery is required for all antennas. Installations shall be compliant with OSHA lockout/tagout requirements. Placement shall be outside of the occupational exposure area.
4. All conductors including grounds, communication, and power shall be guarded. Drip loops into ancillary equipment shall not exceed 8" vertically.
5. If a ground rod is required by antenna owner but does not exist, it shall be installed and maintained by antenna owner.
6. No meters, battery boxes, power supplies, or anything except antenna and cable interface enclosures, which do not exceed 110 cubic inches, may be placed on the pole.
7. No attachments to street light mast arms are permitted.
8. Attachment through bolts shall be lower than 4" below the top of the pole. Antenna owner shall provide calculations that attachments do not exceed NESC pole loading requirements.
9. Radio Frequency (RF) warning signs identifying public exposure limit distances and occupation exposure limit distances shall be placed on the pole no less than 8' from grade.
10. Recommended distance of associated pedestals (or equivalent structures) is 15' from the base of the pole. Pedestals shall not be within 8' of pole.
11. Refer to FE Form 115 Customer Guide for Electric Service when making application for electric service.
12. Under this standard, no antennas shall be allowed on poles where conductors exceed 600 V.
13. Antennas and ancillary equipment shall be through bolted on wood poles and banded on steel or fiberglass poles.

APPROVED BY: JEK/RJE

# Non–FEOC Low Power Antenna Placement on Secondary/Service Pole

FirstEnergy.

| Construction Std. | REV. |
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| 3–305 | 7 |
| | DATE 09/19 |